BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

In the Matter of	:	
	:	
Access Charge Reform	:	CC Docket No. 96-262
	:	
Price Cap Performance Review for Local Exchange Carriers	:	CC Docket No. 94-1
	:	
Low-Volume Long-Distance Users	:	CC Docket No. 99-249
	:	
Federal-State Joint Board On Universal Service	:	CC Docket No. 96-45
	:	

PATHFINDER COMMUNICATIONS, INC.'S REPLY TO THE OPPOSITION OF THE COALITION FOR AFFORDABLE LOCAL AND LONG DISTANCE SERVICE TO PETITIONS FOR RECONSIDERATION

George Bochetto, Esquire
Jeffrey W. Ogren, Esquire

BOCHETTO & LENTZ, P.C.
1524 Locust Street
Philadelphia, PA 19102
(215) 735-3900

Attorneys for Pathfinder Communications, Inc.

October 11, 2000

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

In the Matter of	:	
Access Charge Reform,	:	CC Docket No. 96-262
Price Cap Performance Review for Local	:	CC Docket No. 94-1
Exchange Carriers,	:	
Low-Volume Long-Distance Users,	:	CC Docket No. 99-249
Federal-State Joint Board On Universal	:	CC Docket No. 96-45
Service	:	

PATHFINDER COMMUNICATIONS, INC.'S REPLY TO THE OPPOSITION OF THE COALITION FOR AFFORDABLE LOCAL AND LONG DISTANCE SERVICE TO PETITIONS FOR RECONSIDERATION

The CALLS opposition to Pathfinder's Petition for Reconsideration provides further evidence, as well as acknowledgment, that the CALLS members and the Commission violated numerous acts, rules and regulations in promulgating the CALLS Order. Specifically, the secret back-door meetings that were held between the Commission and the CALLS members violated the Negotiated Rulemaking Act, the Regulatory Flexibility Act, and the Commission's own rulemaking procedures. For the reasons set forth at length below, the Commission's complete dismissal of its duties under these Acts require that the CALLS Order be remanded back to the Commission for genuine, open rulemaking with full participation by the public.

I. CONTRARY TO CALLS' ASSERTIONS, THE PROCESS BY WHICH THE COMMISSION ADOPTED THE CALLS ORDER WAS FUNDAMENTALLY DEFECTIVE

CALLS claims that the CALLS Order is the product of an open and robust public debate. *See* CALLS Opp. at 10. CALLS claims are belied by the record.

A. Interested Parties Were Excluded From The CALLS Rulemaking Proceedings

On May 31, 2000, after the Commission released the CALLS Order, Pathfinder learned, for the first time, of the deceptive and secret negotiations that occurred between the CALLS members and the Commission through the statement of Commissioner Harold Furchtgott-Roth. It became abundantly clear to Pathfinder that numerous entities were precluded from participating in the discussions concerning the CALLS proposal. Specifically, Commissioner Furchtgott-Roth observed that "in the early part of this year, apparently prompted by objections to the original CALLS Proposal raised by groups purporting to represent the consumer interest, the Commission, acting chiefly through the common carrier bureau, held a series of meetings with a ***select group of some*** - - but by no means all - - of the parties with interest in this proceeding. The substance of what was discussed at these meetings was ***not publicly disclosed***. And a number of parties with interest in the outcome of this proceeding. . . ***were not allowed to participate***." *CALLS Order, Furchtgott-Roth dissent* at 1. (Emphasis added.)

Commissioner Furchtgott-Roth also disclosed that "[t]he Commission evidently refereed the negotiations at these meetings, and a 'modified CALLS proposal was reached near the end of February. It is undeniable that the proposal was a product of the negotiations that took place between the Commission and those parties that were allowed to participate in negotiations - - that is, members of the Coalition and some groups that purport to represent the interests of residential and small-business consumers. The Coalition's 'modified proposal' simply memorialized aspects of the agreement that was reached between ***these*** parties and the

Commission in the course of the meetings held in January in February of this year." *CALLS Order, Furchtgott-Roth dissent* at 1-2. (Emphasis added.)

Commissioner Furchtgott-Roth also observed, "the final CALLS deal does not reflect the views of parties that were not included in the CALLS negotiations," and "the process by which the original CALLS proposal was modified is fundamentally inconsistent with the principals of neutrality and transparency that must govern agency decision-making." *CALLS Order, Furchtgott-Roth dissent* at 2-3.

The CALLS Order was the by-product of deceptive and secret negotiations that occurred behind closed doors, out of the view of the public. On this very issue, Commissioner Furchtgott-Roth stated that "[t]he public generally was not notified that the CALLS negotiations were taking place, nor were a number of parties that wished to be included in these negotiations permitted to participate. Not surprisingly, the final CALLS deal does not reflect the views of parties that were not included in the CALLS negotiations, such as the Ad-Hoc Telecommunications User Committee." *CALLS Order, Furchtgott-Roth dissent* at 4.

An alarming example of the Commission's inability to conduct an "open and robust debate" of the CALLS proposal occurred when, six days before the CALLS Order was adopted, the Commission's Industry Analysis Division ("IAD") filed a study in which it determined that the CALLS Proposal interstate rates were reasonable. *CALLS Order*, ¶41. Due to this eleventh hour filing, no party had an opportunity to comment on the Commission's analysis prior to the adoption of the CALLS Order.

The Commission has been cautioned by the D.C. Circuit against reliance on late-filed staff studies. *NARUC v. FCC*, 737 F.2d 1095, 1121 (C.A.D.C. 1984). There, the D.C. Circuit stated:

> Disclosure of staff reports allows the parties to focus on the information relied on by the agency and to point out where that information is erroneous or where the agency may be drawing improper conclusions from it. An agency's denial of a fair opportunity to comment on a key study may fatally taint the agency's decisional process.

737 F.2d at 1121

Unquestionably, none of the parties or even the general public had an opportunity to evaluate the IAD's conclusion, let alone have an opportunity to provide comments on the study to the Commission. CALLS' assertion that the CALLS Order was "the product of open and robust debate" must therefore be rejected in light of the evidence in the record.

Even more egregious than trying to sneak in IAD's survey six days before the CALLS Order was approved, is the fact that, according to Commissioner Furchtgott-Roth,

> proceedings that were unrelated to the issue of access charge reform became part of the negotiations. Incumbent local exchange carrier members of the Coalition apparently contended that they could not commit to certain modifications of the CALLS proposal unless they had confidence that two separate matters . . . would be resolved favorably to them. As a consequence, part of the final agreement reached by the participants to the CALLS negotiations concerned these two separate matters. . . . [T]he Bureau agreed to recommend to the Commission that it approve the waiver that is the subject of this Notice and terminate the CPR audits. . . . The linkage between these unrelated items and the CALLS docket was very clear - - at least internally. To brief the Commissioners and their staff regarding the outcome of the CALLS negotiations, the Bureau distributed briefing sheets outlining the incumbent carriers' concerns and making plain that the depreciation and special access matters had become a key part of the CALLS package. Nothing in this Order, however, tells the public of this connection between this Order and these other dockets.

CALLS Order, Furchtgott-Roth dissent at 2.

Despite CALLS protestations to the contrary, proceedings that were unrelated to the issue of Access Charge Reform became part of the illegal negotiations. Commissioner Furchtgott-Roth, by receiving briefing sheets from the Bureau, witnessed these illegal dealings

and properly reported them in his dissent. In the face of this overwhelming evidence of wrongdoing, CALLS cannot reasonably characterize the promulgation of the CALLS Order as being "the product of open and robust public debate." The facts simply do not support such an assertion.

B. CALLS Admits That The FCC Did Not Follow The Negotiated Rulemaking Act

CALLS' suggestion that the Negotiated Rulemaking Act is permissive and need not be followed is ludicrous and must be rejected. Where an agency desires to base new rules on a "negotiated consensus" among interested parties, it is obligated to follow the procedures set forth in the Negotiated Rulemaking Act ("NRA"). 5 U.S.C. § 561 *et seq.* The NRA leaves the initial choice of whether to conduct the negotiated rulemaking to the agency, but prescribes that in so doing, an agency "shall consider" whether there are "a limited number of identifiable interests" on which representative parties can "reach a consensus. . . within a fixed period of time." *Id.* at §§ 563(a)(2), (a)(4). The CALLS Coalition is precisely such an identifiable group that the agency here used to reach a consensus on issues that had long divided the telecommunications industry. Thus, rather than proceed by way of *ex post facto* rulemaking to rubber-stamp its conclusions, the Commission instead was required to convene a formal "negotiated rulemaking committee" and follow the specific procedures set forth in Section 564 of the NRA, 5 U.S.C. § 564(a), for notice and participation by parties "who will be significantly affected by a proposed rule." 5 U.S.C. § 564(b). The Commission's failure to do so is reversible error. An agency retains the choice between APA rulemakings and NRA negotiations, but cannot substantively participate in structuring a private, negotiated

compromise without first invoking the procedural protections guaranteed to non-participants by the NRA.

Even if the NRA were not directly applicable, the general "sunshine" provisions of the APA - - that an agency provide adequate public notice of proposed rules, address substantive public comments on its Proposals, and make decisions based solely on the public record - - clearly apply. The APA requires that federal agencies conduct rulemaking proceedings in a manner that invites and considers public comment and in which all agency findings are made on the basis of the public record. 5 U.S.C.§ 553. Rules not promulgated in accordance with these procedures warrant vacation. *United States v. Garner*, 767 F.2d 104 (5th Cir. 1985); *United States Steel Corp. v. EPA*, 595 F.2d 207, 215 (5th Cir. 1979).

Despite the evidence of ongoing discussions and negotiations between the CALLS coalition and the Commission, no public record of *ex parte* communication appears until February 25, 2000, just before release of the Modified Proposal. Thus, much of the discussion surrounding the CALLS Proposal was never made public, and unlawfully formed the basis of the Commission's decision in violation of these settled rules of administrative procedure. The fact that the Commission later formally sought comment on the Modified Proposal indicates more the Commission's desire to paper over its defective procedure rather than an effort to comply with the APA.

In fact, Commissioner Furchtgott-Roth's dissent strongly suggest that the agency in fact "signed off" on the CALLS Modified Proposal before its submission. The public comment period was therefore meaningless. In this regard, it is instructive that a substantial number of commenters - - as many as half of the parties that submitted reply comments on the Modified Proposal - - voiced myriad, substantive concerns with the Proposal, in both its methodology

and its potential anti-competitive impact, that remain unaddressed by the Commission. As a procedural matter, of course, the Commission's failure to consider and address all submitted comments is itself an established ground for vacating the CALLS Order. 5 U.S.C. § 553; *Motor Vehicle Mfrs. Ass'n. v. State Farm Mutual Ins.*, 463 U.S. 29 (1983).

As Commissioner Furchtgott-Roth observed, "the process by which the original CALLS Proposal was modified is fundamentally inconsistent with principles of neutrality and transparency that must govern agency decisionmaking." *CALLS Order, Furchtgott-Roth dissent* at 2. The Commission must therefore vacate the CALLS Order and remand it to the rulemaking stage to cure these procedural defects.

While admitting that the Commission did not follow the NRA in promulgating the CALLS Order, CALLS has also admitted to participating in *ex parte* presentations before Commissioners and Commission staff pursuant to the Commission's rules governing permit-but-disclose rulemaking proceedings pursuant to 47 C.F.R. § 1.1206. 47 C.F.R. § 1.1206 basically provides that *ex parte* presentations to or from Commission decision-making personnel are permissible in certain proceedings provided that the *ex parte* presentations to Commission decision-making personnel are disclosed to the public pursuant to paragraph (b). 47 C.F.R. § 1.1206(a).

In the event an *ex parte* communication does occur under this section, depending on the presentation, various disclosures ***must*** be made to the general public. 47 C.F.R. § 1.1206(b) For example, if *ex parte* presentations occur in the form of a discussion at a widely attended meeting, the disclosure rule may be satisfied by submitting a transcript or tape recording of the discussion. 47 C.F.R. §1.1026 (Note 1 to Paragraph (b)). Moreover, the Commission must place in the public file or record of the proceeding, written *ex parte* presentations and

memoranda reflecting oral *ex parte* presentations. The Secretary of the Commission must issue a public notice listing any written *ex parte* presentations or written summaries of oral *ex parte* presentations received by his or her office relating to any permit-but-disclose proceeding.

A review of the underling dockets from which the CALLS Order was promulgated reveals that at no time prior to February 25, 2000, was there ever any public record of *ex parte* communications. This is not surprising given Commissioner Furchtgott-Roth's observations: "[t]he substance of what was discussed at these meetings was not publicly disclosed." *CALLS Order, Furchtgott-Roth dissent* at 1. Indeed, Commissioner Furchtgott-Roth notes that "the substance and scope of the CALLS negotiations was not made public, and there is no public record describing whatever consensus was finally reached." Presumably, had the Commission adhered to 47 C.F.R. § 1.1206, a public record of these *ex parte* communications would be available for review this day. Of course, a record of these *ex parte* presentations does not exist because neither the Commission nor the CALLS members adhered to the rules governing permit-but-disclose rulemaking.

C. The Commission Violated The Regulatory Flexibility Act

CALLS contends that the Commission fulfilled its obligations under the Regulatory Flexibility Act. See CALLS Opp. at 13. Again, CALLS assertions are belied by the record.

In the CALLS Order, the Commission determined that only 13 price cap LECs and 129 competitive local exchange providers qualified as "small entities" under the Regulatory Flexibility Act ("RFA"). *CALLS Order*, ¶¶257-258. In order to justify its position that these were the only small entities affected, the agency suggested that it did not have sufficient data to determine whether there were any more than the 13 price cap LECs and 129 CLECs that would be affected by the CALLS Order.

As Pathfinder pointed out in its Petition for Reconsideration, however, the Commission went to great lengths to ascertain the total number of "small business" telephone companies that would be affected by its *Truth-In-Billing Order*. As part of the Final Regulatory Flexibility Analysis ("FRFA") performed in the *Truth-In-Billing Order*, the Commission determined that there were "3,497 firms providing telephone services at the end of 1992." (*Truth-In-Billing Report and Order* ¶82.) Of the 3,497 firms identified, the Commission noted that 339 firms were Resellers.

Interestingly, in the *Truth-In-Billing Report and Order* the Commission stated that it obtained the above data from the Telecommunications Relay Service ("TRS"), the same source it reviewed in the CALLS Order. Therefore, as the *Truth-In-Billing Report and Order* was promulgated before the CALLS Order, this information was readily available to the Commission at the time it was conducting its Regulatory Flexibility Analysis and should have been used.

Remarkably, CALLS has suggested that the *Truth-In-Billing Report and Order* is irrelevant in this case. This is surprising given the fact that the Commission cited the *Truth-In-Billing Order* on no less than four occasions in the CALLS Order itself. *CALLS Order*, ¶¶ 77, 108, 221, 249. Despite CALLS' meritless protestations, an overwhelming fact remains: the Commission had the "small entity" information available to it, but ignored it because it knew

the RFA analysis would reveal, once and for all, the devastating impact the CALLS Order has on small businesses.[1]

---

[1] As Pathfinder pointed out in its Comment, PICC has never worked. In the first six months of this year, Pathfinder incurred $3,717,882 in FCC authorized PICC assessments on the same subscriber lines that generated $3,176,812 in usage charges.

Pathfinder's criticism of the Commission's failure to abide by the RFA has been vigorously supported by the Small Business Administration which has detailed at length the numerous shortcomings in the Commission's compliance with the RFA. *See* SBA September 12, 2000 *ex parte*. Of course, CALLS attempts to recharacterize the SBA's criticism of the Commission by suggesting that it only focuses on the small business end-users and not on the affected small entities in the proceeding. While the SBA does fault the Commission for failing to consider end-users as affected small entities, it does not "primarily" fault the Commission in this regard.

Ultimately, the SBA "found scant evidence that the Commission considered the impact of this far-reaching order on small businesses or undertook even a modicum of effort to comply with the RFA." *See* SBA September 17, 2000 *ex parte*. The Commission must vacate the CALLS Order and remand it so that it can fully comply with the RFA.

II. CONCLUSION

For all of the foregoing reasons, Pathfinder requests the Commission grant its Petition for Reconsideration.

Respectfully submitted,

BOCHETTO & LENTZ, P.C.

By: _____
George Bochetto, Esquire
Jeffrey W. Ogren, Esquire

CERTIFICATE OF SERVICE

I, Jeffrey W. Ogren, Esquire do hereby certify that a true and correct copy of Pathfinder Communications, Inc.'s Reply to the Opposition of the Coalition for Affordable Local and Long Distance Service to Petitions for Reconsideration was served via overnight mail on this 10th day of October, 2000, to the following:

Magalie Roman Salas
Secretary
Federal Communications Commission
The Portals - TW-A325
445 12th Street, S.W.
Washington, DC 20554

John T. Nakahata
Harris, Wiltshire & Grannis, LLP
1200 18th Street, N.W.
Washington, DC 20036

Christopher Wright
Federal Communications Commission
The Portals - 445 12th Street, SW
Fifth Floor
Washington, DC 20554

Laurence Bourne
Federal Communications Commission
The Portals - 445 12th Street, SW
Fifth Floor
Washington, DC 20554

Dorothy Atwood
Chief Common Carrier Bureau
Federal Communications Commission
The Portals - 445 12th Street, S.W.
Room 500
Washington, DC 20554

BOCHETTO & LENTZ, P.C.

Jeffrey W. Ogren, Esquire